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I. Introduction

The fourteenth amendment's prohibitions are clearly some "of the majestic generalities of the Constitution."[1] Hence, that amendment has become the most litigated and most controversial of the Civil War Amendments. Despite more than a century of litigation, however, the United States Supreme Court has been unable to develop a consistent and coherent body of principles to be applied to equal protection cases.[2] Instead, the Court has developed a "fluid" form of equal protection analysis in which the Court focuses upon the discriminatory character of the legislative classification and the state interests asserted in support of that classification. If the Court determines that the state objective does not justify the legislation's discriminatory character, or that the discriminatory statute is only tenuously related to that objective, then the statute is invalidated.

This note examines, in the contexts of sex-based discrimination and discrimination against illegitimate children, the Supreme Court's "fluid" equal protection analysis. These two areas provide a fertile source of discussion since the Court has found that neither of these areas fits easily into either of the traditional categories of analysis—rational basis[3] or strict scrutiny.[4] This note also discusses the reasons for the Court's approach as well as the problems inherent in it. The note concludes with a suggested alternative mode of analysis. It is appropriate at this point to review briefly the history of both equal protection and its predecessor, substantive due process, since the Court's approach under both headings is strikingly similar.

II. Substantive Due Process

From the *Allgeyer v. Louisiana*[5] decision in 1905 to the mid-1930's, the

1 Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting).

2 When federal action is scrutinized, the appropriate provision is the due process clause of the fifth amendment, which has been held to include protections substantially the same as those afforded by the equal protection clause. *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (invalidating racial segregation in public schools of District of Columbia as violative of due process guaranteed by fifth amendment).

3 *See* text accompanying notes 15 to 17 *infra.*

4 *See* text accompanying notes 18 to 21 *infra.*

5 165 U.S. 578 (1897). *Allgeyer* was the first Supreme Court decision overturning a statute on substantive due process grounds. The case involved a Louisiana statute prohibiting a person from doing an act in the state to effect insurance on any Louisiana property from a marine insurance company which had not complied in all respects with Louisiana law. The Court reversed defendant's conviction for mailing a letter advising an insurance company in New York of the shipment of goods in accordance with a marine policy because the statute in question violated the fourteenth amendment by depriving defendant of his liberty without "due process of law." Speaking for the majority, Justice Peckham said, "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person . . . but the term is deemed to embrace the right of the citizen . . . to enter into all contracts which may be proper, necessary, and essential. . . ." *Id.* at 589.

Some critics have maintained that "liberty" at common law meant no more than freedom from physical restraint and that the basic flaw of the substantive due process philosophy was the expansion of this notion. *See, e.g.,* Warren, *The New "Liberty" Under the Fourteenth Amendment,* 39 HARV. L. REV. 431 (1926).

Supreme Court invalidated on substantive due process grounds a considerable number of laws dealing with social and economic matters. This period was characterized by the Court's (1) expansive notion of liberty which included more than a freedom from physical restraint,[6] (2) unduly narrow conception of governmental objectives legitimately within state police power,[7] and (3) strict judicial scrutiny of challenged legislation.

The interventionist stance taken by the Court[8] during this time was severely criticized by commentators and jurists alike. The critics felt that (1) the Court's expansive view of "liberty" and "property" included values not specifically in the Constitution, (2) the Court failed to state general standards to be applied in evaluating legislation while the standards articulated were inadequate and employed inconsistently, and (3) the Court became excessively preoccupied with the permissibility of legislative ends.[9]

Beginning in 1934, the Court began to retreat from its activist position characteristic of the substantive due process era. In that year, in *Nebbia v. New York*,[10] the Court upheld a New York statute authorizing an administrative board to set prices for milk, stating that "the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[11]

The Court proceeded to overrule *Adkins* three years later in *West Coast Hotel Co. v. Parrish*[12] by upholding the validity of a Washington statute providing for the establishment of minimum wages for women. The demise of substantive due process was completed by the Court's decision in *Lincoln Union v. Northwestern Co.*[13] There the Court specifically denounced its substantive due process philosophy, stating that "the due process clause is no longer to be so broadly construed that the Congress and the state legislatures are put in a straitjacket

6 Warren, *supra* note 5, at 462-63.

7 GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 567 (9th ed. 1975).

8 Four cases symbolizing the intervention of this era are Lochner v. New York, 198 U.S. 45 (1905); Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915); Adkins v. Children's Hospital, 261 U.S. 525 (1923).

In *Lochner*, a statute which prohibited employers from requiring employees of bakeries to work more than 60 hours a week or ten hours a day was held unconstitutional on the ground that it interfered with the liberty of contract between employer and employees. The opinion is characterized by the Court's use of a subjective standard of due process.

Three years later, the Court in *Adair* invalidated a federal law which prohibited employment contracts that required interstate railroad employees to refrain from becoming labor union members (so-called "yellow dog" contracts). The Court saw the statute as an unjustifiable interference with the liberty of contract. It relied upon *Adair* in *Coppage* to declare a similar state statute unconstitutional.

Finally, in *Adkins*, the Court struck down the Minimum Wage Act of 1918 which authorized the fixing of minimum wage standards for adult women in any occupation in the District of Columbia because it was an unconstitutional interference with the liberty of contract.

9 *See* GUNTHER, *supra* note 7, at 565.

10 291 U.S. 502 (1934).

11 *Id.* at 525.

12 300 U.S. 379 (1937).

13 335 U.S. 525 (1949). The Court sustained a Nebraska constitutional amendment and a North Carolina statute which provided, in effect, that no persons in those states could be denied an opportunity to obtain or retain employment regardless of their union status, nor could an employer contract with a union organization so as to exclude persons from employment depending on their union affiliation.

when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare."[14] It was only as the era of substantive due process came to a close that the equal protection clause began to attain a genuine measure of vitality.

III. Equal Protection—The Two Tiers

During the period of time that the Court utilized substantive due process analysis to strike down what it considered to be undesirable state statutes, the constitutional guarantee of equal protection was rarely invoked. In fact, in 1927, Justice Holmes in *Buck v. Bell* wrote that equal protection was "the usual last resort of constitutional arguments. . . ."[15] When economic or social legislation was challenged on equal protection grounds, the Court applied what has generally been known as the "rational basis" or "reasonable basis" standard. This traditional and still viable model of review is best explained by the late Chief Justice Earl Warren in *McDonald v. Board of Election*:

> The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only if no grounds can be conceived to justify them.[16]

The test is highly permissive and requires such minimal scrutiny of challenged statutes that it has been critically said to result in the "total abdication of judicial review."[17]

Within a few years of Justice Holmes' remarks in *Buck*, Justice Stone, in *United States v. Carolene Products Co.*,[18] introduced a second standard of equal protection review for those situations in which the discriminatory classification either threatened a fundamental constitutional right[19] or involved a suspect class.[20]

14 *Id.* at 536-37.
15 274 U.S. 200, 208 (1927).
16 394 U.S. 802, 809 (1969).
17 Note, *Illegitimacy and Equal Protection: Two Tiers or An Analytical Grab-bag*, 7 LOY. CHI. L. J. 754, 756 (1976).
18 304 U.S. 144, 152 n. 4 (1938).
19 The following have been labelled fundamental rights:
a. Voting—Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).
b. Procreation—Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942).
c. Rights with Respect to Criminal Procedure—Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).
d. Right to Travel—Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
20 By suspect class the Court means one including those people with characteristics that are highly visible, immutable, and determined solely by birth which frequently bear no relation to ability to perform or contribute to society. *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973). In addition, it is usually a class that has been historically vilified and one that has lacked political power. *See* San Antonio School Dist. v. Rodriquez, 411 U.S. 1, 28 (1973). The following have been labelled suspect classifications: a. Race—Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954); b. Ancestry—Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944); c. Alienage—In re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

Under such circumstances, Justice Stone suggested that the Court strictly scrutinize the legislation by rigorously analyzing the necessity of the classification as a means of accomplishing a compelling state interest. A statute subject to such severe examination is nearly always struck down since the standard demands "nothing less than perfection."[21]

At the beginning of the 1960's, judicial intervention under the banner of equal protection was virtually nonexistent in other than racial discrimination cases. During that decade, however, the Warren Court took an interventionist stance embracing a rigid two-tier standard of strict scrutiny and rational basis.[22] It used the equal protection clause to strike down state statutes interfering with the newly established fundamental interests of voting, interstate travel, and criminal appeal.[23] Although the number of interests identified as fundamental was in fact quite modest, the language of the Court's opinions was particularly open-ended. Thus, the language seemed to invite consideration of analogous spheres that would similarly qualify for rigorous scrutiny.

The Burger Court, however, has been reluctant to add to the list of fundamental interests specified by its predecessor.[24] In addition, the Court has become dissatisfied with the two-tier model itself. As a result, the Court, which nominally still adheres to the two-tier system of equal protection review,[25] has alluded to at least one intermediate standard to handle those cases that fall between the extremes of rational basis and strict scrutiny. Two such types of cases are those involving discrimination based on sex and discrimination against illegitimate children. Because the Court has found that neither category of discrimination involves economic legislation, the "rational basis" test is not applicable; conversely, the classifications are not suspect and thus do not fall within strict scrutiny analysis.

Examining these two areas is instructive because they illustrate the difficulty that the Court has had in fashioning a standard of equal protection that can be applied consistently to the wide variety of legislative classifications with which it must contend. In addition, such an examination highlights the shortcomings of the Court's "fluid" equal protection analysis.

A. Discrimination Against Illegitimate Children

1. The Warren Court

21 *See* the dissenting opinion of Chief Justice Burger in Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) in which he addressed the question of how to judge the durational residency requirements imposed by Tennessee as a precondition to the exercise of the ballot franchise by new residents: "Some lines must be drawn. To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection."

22 Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972).

23 *See* note 19 *supra.*

24 Gunther, *supra* note 22, at 12.

25 The Court specifically approved the two-tiered standard of review in San Antonio School Dist. v. Rodriquez, 411 U.S. 1, 17 (1973).

In the 1968 case of *Levy v. Louisiana,*[26] the Court first applied the guarantees of the equal protection clause on behalf of illegitimates.[27] There the Court invalidated a Louisiana statute that prohibited an illegitimate child from recovering damages in a wrongful death action for the death of his mother. Justice Douglas, writing for the majority, rejected the state's argument that the legislation discouraged "bringing children into the world out of wedlock."[28] He concluded that it was "invidious to discriminate"[29] against the illegitimate children since "no action, conduct, or demeanor of theirs [was] possibly relevant to the harm that was done the mother."[30]

On the same day, the Court, in *Glona v. American Guarantee & Liability Insurance Co.,*[31] struck down as violative of the equal protection clause a Louisiana wrongful death statute that permitted recovery by a parent of a legitimate child but not by a parent of an illegitimate. Surprisingly, the Court used deferential rational basis phraseology to invalidate the legislation. The majority reached its decision because it could discern no rational basis for assuming that illegitimacy would be promoted if the natural mother was allowed to recover for the wrongful death of her illegitimate child.[32] The statute was therefore constitutionally flawed.

Although in the *Levy* and *Glona* opinions the Court purported to employ the less demanding rational basis test, it is impossible to escape the conclusion that the Court actually applied an equal protection analysis which was stronger than that deferential standard. Justice Douglas' use of the term "invidious discrimination" to characterize the classifications at issue compels this conclusion. Thus, the above-cited opinions seemed to indicate that classifications based on illegitimacy would in the future be deemed constitutionally suspect.[33]

2. The Burger Court

Levy and *Glona* were decided during the last days of the Warren Court. *Labine v. Vincent,*[34] on the other hand, was decided by the Burger Court and typified its reluctance to expand the number of suspect classifications and fundamental interests. *Labine* involved legislation under which an illegitimate

26 391 U.S. 68 (1968).

27 At common law, an illegitimate child was said to be *filius nullius,* that is, the child of nobody. He had no father according to the law, and his rights, especially the right of inheritance, were severely restricted. Until 1968, the Supreme Court did little more than affirm the power of state legislatures to modify this common law rule. *See e.g.,* Cope v. Cope, 137 U.S. 682 (1891), which upheld a Utah statute that provided for an illegitimate child and its mother to inherit in like manner from the father.

28 391 U.S. at 70.

29 *Id.* at 72. The term "invidious discrimination" was Justice Douglas' personalized shorthand for strict scrutiny. *See* Wallach & Tenoso, *A Vindication of the Rights of Unmarried Mothers and Their Children: An Analysis of the Institution of Illegitimacy, Equal Protection, and the Uniform Parentage Act,* 23 KAN. L. REV. 23, 40 (1974).

30 391 U.S. at 72.

31 391 U.S. 73 (1968).

32 *Id.* at 75.

33 Wallach & Tenoso, *supra* note 29, at 43; Note, *Illegitimacy and Equal Protection,* 49 N.Y.U. L. REV. 479 (1974) [hereinafter cited as *Illegitimacy*].

34 401 U.S. 532 (1971).

child was barred from receiving the same share of his father's estate as did his legitimate sibling. Justice Black wrote the majority[35] opinion upholding the intestate succession statute on the ground that the state had power to establish rules for the protection and strengthening of family life through regulation of the disposition of property. *Levy* and *Glona* were distinguished as tort cases while *Labine* involved property rights.[36] Furthermore, the Court differentiated *Labine* from *Levy* because of the existence in the former of statutory alternatives for legitimizing the child.[37]

In his opinion, Justice Black simply refused to apply any type of equal protection analysis in deference to the state's interest in regulating the disposition of property at death. He indicated, however, that were he to have applied an equal protection analysis, the rational basis test would have been the appropriate standard;[38] the statute would have been valid in view of the legitimate state interest involved.[39]

a. Weber v. Aetna Casualty & Surety Co.—*Reconciliation*

The *Levy, Glona,* and *Labine* decisions are difficult to reconcile. One year after *Labine,* however, the Court attempted to clarify its position on the rights of illegitimates. In *Weber v. Aetna Casualty & Surety Co.,*[40] the Court invalidated a Louisiana statute which denied equal workmen's compensation recovery rights to a dependent but unacknowledged illegitimate child. The Court found *Levy* to be the applicable precedent because of similarities in the origins and purposes of the statutes in each case and because of Louisiana's pattern of discrimination in recovery rights. Speaking for the Court, Justice Powell stated that the essential inquiry in *Weber* was a dual one: "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[41] The Court then concluded that the state interest in legitimate family relationships was important, but was not served by the statute. The Court found no significant relationship between the classifications and "those recognized purposes of recovery which workmen's compensation statutes commendably serve."[42] Thus, in the Court's view, the discriminatory character of the classification was not justified.

The decision in *Weber* marked one of the most overt attempts by the Court to escape the two-tier framework of equal protection analysis. Justice Powell's

35 Justice Black, along with Justices Harlan and Stewart, dissented in *Levy* and *Glona.* In the interim between the *Glona* and *Labine* decisions, Chief Justice Burger and Justice Blackmun joined the Court. The five of them constituted the majority.

36 401 U.S. at 535-36.

37 *Id.* at 539. Vincent could have left one-third of his property to his illegitimate daughter if he had executed a will. Also, he could have married his daughter's mother in which case the child could have inherited his property either by intestate succession or by will. Finally, he could have voluntarily acknowledged his paternity.

38 *Id.* at 536 n.6.

39 *Labine* has been criticized by commentators for being deeply rooted in moral prejudice. *See* Wallach & Tenoso, *supra* note 29, at 47-48. The Court has since limited *Labine*'s application. *See Trimble,* 430 U.S. 762 and text accompanying notes 62 to 73 *infra.*

40 406 U.S. 164 (1972).

41 *Id.* at 173.

42 *Id.* at 175.

majority opinion blurred the distinctions between strict and minimal scutiny through the use of a comprehensive two-fold inquiry. This inquiry attempts to center on the merits of the particular controversy and allow for an examination of the conflicting policies and interests surrounding a challenged statute. Inherent in this examination is a comparison by the Court of the legislative ends sought to be achieved with the means chosen to fulfill those objectives. If the Court concludes that the governmental interest is not adequately promoted by the legislative classification, the statute is invalidated. The use of this two-fold inquiry can be traced throughout the succeeding cases on illegitimacy.

b. *After* Weber

In *Gomez v. Perez*[43] and *New Jersey Welfare Rights Org. v. Cahill*,[44] two *per curiam* opinions rendered in 1973, the Court employed the *Weber* two-pronged inquiry by examining the relative importance of the state interest and the character of the discrimination caused by the classification. In *Gomez*, the Court struck down a Texas law which denied the right of paternal support to an illegitimate child while granting it to a legitimate offspring. The Court held that "once a State posits a judicially enforceable right on behalf of children to needed support from their natural father there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother."[45]

The *Gomez* principle was applied in *Cahill* in which the state government, rather than the natural father, had the judicially enforceable duty to provide needed financial support. The Court struck down as violative of equal protection a statute limiting benefits of the "Assistance to Families of the Working Poor" program to those households in which the parents were "ceremonially" married to each other and had at least one minor child. In both *Gomez* and *Cahill*, the Court appeared to compare means with ends using a standard less demanding than strict scrutiny, but one sufficiently strong to show that distinctions based on illegitimacy were important and deserving of a high degree of protection.[46]

In *Jiminez v. Weinberger*,[47] the Court used equal protection language from *Weber* to strike down a provision of the Social Security Act which completely barred a nonlegitimated afterborn[48] illegitimate child from recovering disability insurance benefits.[49] The statute stated further that if the illegitimacy

43 409 U.S. 535 (1973).
44 411 U.S. 619 (1973).
45 409 U.S. at 538.
46 *Id.*; 411 U.S. at 620-21; *Illegitimacy, supra* note 33, at 494-96.
47 417 U.S. 628 (1974).
48 Afterborn means the child was born after the onset of the parent's disability.
49 42 U.S.C. § 416 (h)(3) 1970. Under the Social Security Act, an illegitimate child was deemed entitled to disability insurance benefits without any showing that he was in fact dependent upon his disabled parent if state law permitted the child to inherit from the wage-earner parent; if his illegitimacy resulted solely from formal, nonobvious defects in his parents' ceremonial marriage; or if he was legitimated in accordance with state law. An illegitimate child unable to meet any of the foregoing conditions could qualify only if the disabled wage earner parent contributed to the child's support or lived with him prior to the parent's disability.

was due to a formal, nonobvious defect in the parent's ceremonial marriage or if the child was legitimized in accordance with state law, recovery was permitted. Chief Justice Burger, writing for the majority, specifically refused to determine whether illegitimacy was a suspect classification.[50] He did state, however, that the evils of the complete statutory bar to disability benefits did not reasonably promote the valid governmental interest of preventing spurious claims.[51] In addition, he found that the statute was "overinclusive" because it benefitted certain types of children deemed legitimate who were not actually dependent. Conversely, the Act was "underinclusive" because it excluded some illegitimates who were, in fact, dependent upon their disabled parent.[52] Those illegitimate children who were denied benefits were not given an opportunity to prove their dependence; they were irrebuttably presumed not to be dependent. The Court concluded that "to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment."[53] The rigor of inspection employed in *Jimenez* made the test closely resemble strict scrutiny.

In *Mathews v. Lucas*,[54] however, the Court rejected appellant's argument that illegitimacy was a suspect classification, stating that "discrimination between individuals on the basis of their legitimacy does not 'command extraordinary protection from the majoritarian political process' . . . which our most exacting scrutiny would entail."[55] The Court conceded that illegitimacy was analogous in many respects to personal characteristics that have been held to be suspect when used as the basis of statutory differentiation, but it nevertheless concluded that the analogy was insufficient.[56] The opinion stated:

> [P]erhaps in part because the roots of the discrimination rest in the conduct of the parents rather than the child, and perhaps in part because illegitimacy does not carry an obvious badge, as race or sex do, this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes.[57]

The Court therefore adhered to its earlier stance of not applying strict scrutiny to challenged legislation of this type.

Citing the *Weber* two-pronged inquiry,[58] the Court in *Mathews* upheld a Social Security plan providing benefits to a surviving child who was dependent

50 "Appellants urge that the contested Social Security provision is based upon the so-called 'suspect classification' of illegitimacy. . . . We need not reach appellant's argument, however. . . ." 417 U.S. at 631.
51 *Id.* at 636.
52 *Id.* at 637.
53 *Id.*
54 427 U.S. 495 (1976).
55 *Id.* at 506 (citations omitted).
56 The Court concluded that illegitimacy, like race or national origin, is a characteristic determined by causes not within the control of the individual and that it bears no relation to his ability to participate in and contribute to society. Moreover, because the law has long placed the illegitimate child in an inferior position relative to the legitimate child, there has been a history of vilification. *Id.* at 505-06.
57 *Id.* at 506 (citing *Frontiero*, 411 U.S. at 684-86).
58 *Id.* at 504.

on his parent at the time of the parent's death.[59] The plan conditioned eligibility of certain illegitimate children upon a showing that: (1) the decreased wage earner was the claimant child's parent, and (2) the child resided with the wage earner up to the time of death and received support during that period. However, only a child who was legitimate or statutorily deemed legitimate enjoyed a presumption of dependency. The Court found the statutory classifications to be justified as reasonable legislative judgements designed to qualify entitlement to benefits upon a child's dependency at the time of the parent's death.[60] It brushed aside previous illegitimacy cases[61] saying that in all but one case the legislation denied benefits solely because of the child's illegitimacy regardless of dependency. In the sole partial exception, *Weber,* workmen's compensation benefits hinged on proof not only that the child was dependent but, also, that the dependent child was legitimate. The Court saw the Social Security plan as aimed solely at establishing dependency.

In *Trimble v. Gordon,*[62] the most recent Supreme Court decision regarding illegitimates, a divided Court invalidated § 12 of the Illinois Probate Act[63] which allowed an illegitimate child to inherit though intestate succession from his mother only, while a legitimate child could inherit from both parents. As it had done in *Lucas,* the Court said that the constitutionality of the law in question depended "upon the character of the discrimination and its relation to legitimate legislative aims."[64] In essence then, the Court employed the two-fold inquiry enunciated in *Weber.* Using that yardstick, the Court determined that § 12 could not be justified on the ground that it promoted legitimate family relationships because it bore "only the most attenuated relationship to the asserted goal."[65] The Court decided that the difficulties of proving paternity could not justify total statutory disinheritance of an illegitimate child whose father died intestate. Moreover, it concluded that both the legislature and the Supreme

59 Section 202 (d) (1) of the Social Security Act, 42 U.S.C. § 402 (d) (1) (1970) provides that an unmarried son or daughter of an individual, who died fully or currently insured under the Act, may apply for and be entitled to a survivor's benefits, if the applicant is under 18 years of age at the time of application (or is a full-time student and under 22 years of age) and was dependent, within the meaning of the statute, at the time of the parent's death. A child is considered dependent for this purpose if the insured father was living with or contributing to the child's support at the time of death. Certain children, however, are relieved from the burden of showing dependency. These children include those who are legitimate or who would be entitled to inherit personal property from the insured parent's estate under the applicable state intestacy law. Moreover, unless adopted by another individual, a child is entitled to a presumption of dependency if the decedent, before death, (a) had gone through a marriage ceremony with the other parent, resulting in a purported marriage between them which, but for a nonobvious legal defect, would have been valid, or (b) in writing had acknowledged the child to be his, or (c) had been decreed by a court to be the child's father, or (d) had been ordered by a court to support the child because the child was his. *Id.* at 497-99.

60 *Id.* at 510.

61 These included *Gomez, Cahill, Weber,* and *Levy.*

62 430 U.S. 762 (1977).

63 ILL. REV. STAT. ch. 3, § 12 (1973) provided, in pertinent part, that "[a]n illegitimate child is heir of his mother and of any maternal ancestor and of any person from whom his mother might have inherited if living. . . . A child who was illegitimate whose parents intermarry and who is acknowledged by the father as the father's child is legitimate."

64 430 U.S. at 769 (citing Mathews v. Lucas which, in turn, had cited *Weber* for its authority).

65 430 U.S. at 768.

Court of Illinois[66] "failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity."[67] The Court felt that the inheritance rights of significant categories[68] of illegitimate children could be recognized without jeopardizing the orderly settlements of estates or the dependability of titles to property passing under intestacy laws. Thus, since § 12 excluded those categories of children unnecessarily, it was constitutionally flawed.[69]

Four Justices dissented on the ground that *Trimble* was constitutionally indistinguishable from *Labine v. Vincent*.[70] The majority found *Labine* to be inapplicable because it was "difficult to place in the pattern of this Court's equal protection decisions, and subsequent cases [had] limited its force as a precedent."[71] The prevailing Justices, however, did affirm the view in *Labine* that judicial deference is appropriate when the challenged statute involves a state's interest in providing for the stability of land titles and the prompt and accurate determination of property ownership. They concluded, however, that such deference was not meant to be absolute; there was a point beyond which this deference could not justify discrimination.[72] Noting that its analysis in *Trimble* was more exacting than its inspection of the Louisiana statute in *Labine,* the Court concluded that the more recent analysis would be controlling in the future.[73] The test utilized in *Trimble* is essentially the *Weber* twofold inquiry which differs radically from the analysis employed in *Labine*. In *Labine,* the Court was extremely deferential to the state legislature, choosing not to apply any type of equal protection analysis. Therefore, although *Labine* has not been specifically overruled, *Trimble* has severely eroded its precedential value. Moreover, it is apparent that the *Weber* twofold inquiry continues to be the analysis used by the Court in examining cases involving discrimination against illegitimates. It is also the analysis that is applied to cases concerning discrimination based on sex.

B. *Sex-Based Discrimination*

The history of the Court's treatment of discrimination based on sex parallels its approach to discrimination directed toward illegitimates. Until recently, sex-based classifications were virtually immune from attack under the equal protection clause. Within the last seven years, however, successful challenges to legislation discriminating on the basis of sex have become increasingly frequent. As

66 On June 2, 1975, the Illinois Supreme Court handed down its opinion in In re Estate of Karas, 61 Ill. 2d 40, 329 N.E. 2d 234 (1975), sustaining § 12 against all constitutional challenges.

67 430 U.S. at 770-71.

68 For example, illegitimate children whose parents never married but whose father acknowledged them, or illegitimate children who were in fact dependent on their father and living with him at the time of his death were not given the opportunity to inherit from their deceased father.

69 430 U.S. at 776.

70 *See* text accompanying notes 34 to 39 *supra.*

71 430 U.S. at 767 n. 12.

72 *Id.* Unfortunately, the Court did not elaborate on the point of justification.

73 *Id.* at 776 n. 17.

a result, this clause is a powerful weapon in combating publicly sanctioned sex discrimination.

Before 1971, the Supreme Court generally upheld the constitutionality of sex-based classifications. Applying the standard of minimal scrutiny, the Court invariably[74] held that the distinction under attack was reasonable in view of the proper role of women in society[75] or the need of females for greater protection.[76] Because the Court proceeded on the assumption that there were vast differences between women and men, the different treatment accorded the sexes could easily be found to have a rational connection to a legitimate public objective.

In 1971, however, the Court began to alter its approach to cases involving sex discrimination. *Reed v. Reed*[77] marked the first time that the Court invalidated a sex discrimination statute on equal protections grounds. The Court in *Reed* rejected a mandatory provision of the Idaho probate code that gave preference to men over women when persons of the same entitlement class applied for appointment as administrators of a decedent's estate. Using slightly ambiguous rational basis rhetoric,[78] the Court provided relief for those disadvantaged by the sex-based classification. The Court applied a fairly rigorous means-to-end analysis[79] and concluded that selecting applicants for letters of administration on the basis of sex might fulfill the state objective of reducing the work load on probate courts by eliminating one class of contests, but not in accordance with the demands of the equal protection clause.[80]

Two years later, in *Frontiero v. Richardson,*[81] Justice Brennan, speaking for a mere plurality of the Court,[82] went a step further and declared sex to be a suspect classification. He struck down as violative of the due process clause of the fifth amendment a federal statute which provided that husbands of female members of the uniformed services were not "dependents" unless they were in fact dependent on their wives for over one-half of their support. Such proof was not required for spouses of male members because they were presumed to be dependent on their husbands. Since sex was suspect, the Court strictly scrutinized the statute and concluded that the government's interest in administrative convenience did not justify the character of the discrimination caused by the classification.[83] Although the Court's scrutiny was more rigorous, its inquiry was

74 An exception was Adkins v. Children's Hospital, 261 U.S. 525 (1923) which was later overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). *See* note 8 and text accompanying notes 12 to 14 *supra.*

75 *E.g.,* Hoyt v. Florida, 368 U.S. 57, 61-63 (1961).

76 *E.g.,* Muller v. Oregon, 208 U.S. 412 (1908).

77 404 U.S. 71 (1971).

78 Although the decision is replete with deferential rational basis phraseology, the Court invalidated the statute. In describing the standards by which the Idaho provisions were to be judged, the Court employed the following language: A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 76 (citing Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). *See also* Comment, 2 Fla. St. L. Rev. 166, 170 n. 25 (1974).

79 *See* text accompanying notes 42-43 *supra.*

80 404 U.S. at 76.

81 411 U.S. 677 (1973).

82 Justice Stewart concurred in the judgment based on *Reed.* Justices Powell and Blackmun, as well as the Chief Justice, concurred in the judgment, but felt that it was unnecessary to arrive at such a far-reaching holding, especially considering that the controversy surrounding the Equal Rights Amendment remained unresolved.

83 411 U.S. at 690-91.

identical in substance to that used in *Weber,* which had been decided a year earlier. Citing *Reed,* the Court concluded that "any statutory scheme which draws lines between sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution].' "[84]

The Court, however, did not retain its activist stance. In the next two sex discrimination cases,[85] *Kahn v. Shevin*[86] and *Schlesinger v. Ballard,*[87] the Court applied a much more deferential standard to the challenged legislation. In *Kahn,* which was decided one year after *Frontiero,* the Supreme Court upheld a Florida statute which granted widows an annual $500 property tax exemption while denying the exemption to widowers. The Court found that spousal loss fell disproportionately upon the female sex and that the policy of the state was to cushion the financial impact of that loss. The Court stated that the case at bar was different from previous sex discrimination cases because it dealt with a state tax law which was reasonably designed to further the state policy involved.[88] One year later, in *Schlesinger v. Ballard,* the Court upheld a federal statute which granted tenure preferences to female naval officers.[89] The majority, relying heavily upon the fact that naval personnel practices offered women less favorable opportunities to compile impressive service records, held that the statute was a permissible means of providing women with an equitable program of advancement in the Navy.[90]

It is significant that in neither *Kahn* nor *Ballard* did the Court rely on the *Frontiero* opinion. Rather, the Court deferred to the respective legislative judgements by employing rational basis language with its familiar minimal scrutiny requirement. The Court has thus tacitly advanced a benign classification theory under which it permissively reviews legislative classifications that are *beneficial* to women. This explanation for the Court's actions in *Kahn* and *Ballard* is supported by its handling of subsequent sex discrimination cases in which it has

84 *Id.* at 690 (emphasis in original).

85 Although Geduldig v. Aiello, 417 U.S. 484 (1974), was decided in the interim between *Kahn* and *Ballard,* it is not included in the text because the majority did not treat it as a sex discrimination case. Instead, they treated it more as a state disability insurance case, upholding a California disability insurance system for private employees temporarily disabled by an injury or illness not covered by workmen's compensation even though the plan excluded certain disabilities including some attributable to pregnancy. The prevailing Justices cited Dandridge v. Williams, 397 U.S. 471 (1970), saying that "the Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all." *Id.* at 486-87. The Court concluded that the state was not required to sacrifice certain attributes of the system only to provide protection against another risk of disability—normal pregnancy.

The Court distinguished *Reed* and *Frontiero* saying that the insurance program did not exclude anyone from benefit eligibility because of gender, but merely removed one physical condition—pregnancy—from the list of compensable disabilities. 417 U.S. at 496 n. 20.

86 416 U.S. 351 (1974).

87 419 U.S. 498 (1975).

88 416 U.S. at 355.

89 Under 10 U.S.C. § 6382 (1970), a male naval officer was allowed ten years of commissioned service to secure a promotion before being mandatorily discharged. A female officer, under 10 U.S.C. § 6401 (1970), was given 13 years of active service before a mandatory discharge for want of promotion could be ordered.

90 419 U.S. at 508.

much more rigorously scrutinized legislation adversely affecting the interests of women.

In *Weinberger v. Wiesenfeld,*[91] for example, a majority of the Court invalidated as violative of the fifth amendment guarantee of due process certain provisions of the Social Security Act. Under those provisions, the amount of survivor's benefits granted to a widow and minor children was based on the earnings of the deceased husband and father covered by the Act. In the case of a deceased wife and mother, benefits were granted only to the minor children and not to the widower. Although the widower/plaintiff was the one denied benefits, the Court framed the matter as one involving discrimination against women since women paid the same social security taxes as men but were deprived equal protection for their surviving spouse. Using the analysis from *Weber,* the majority concluded that the state's purpose in allowing widows to elect not to work in order to devote themselves to caring for their children could not justify the lack of protection given to their survivors.[92] The Court decided that the gender-based classification was "entirely irrational" and was indistinguishable from the one held invalid in *Frontiero.*[93]

In the same year in the case of *Stanton v. Stanton,*[94] the Court confronted a Utah statute establishing the age of majority at twenty-one years for males and at eighteen years for females. Appellant challenged the statute on equal protection grounds after her support payments from appellee, her father, were terminated when she attained majority. The Court upheld her challenge, finding *Reed* to be controlling. The majority considered the Utah Supreme Court's "old notions" about women tending to mature earlier and marry sooner than men to be inapplicable to their decision. The real inquiry, according to Justice Blackmun, was "whether the difference in sex between children warrants the distinction in the appellee's obligation to support that is drawn from the Utah statute."[95] The Court concluded that it did not.

By the time the *Stanton* decision was rendered, it had become increasingly unlikely that sex would be declared by a majority of the Court to be a suspect classification. In fact, the Justices in *Stanton* greatly limited the precedential value of the plurality opinion in *Frontiero* when they said, "We find it unnecessary in this case to decide whether a classification based on sex is inherently suspect."[96] The Court then proceeded to use an inquiry less demanding than strict scrutiny, but one sufficiently strong to indicate that distinctions based on sex would not be tolerated unless very good reasons could be given to justify them.[97] The opinion left lower courts uncertain as to the proper level of scrutiny

91 420 U.S. 636 (1975).

92 420 U.S. at 648. The Advisory Council on Social Security, which developed the 1939 Amendments to the Act, said explicitly that the payments to the widow were intended as supplements to the orphan's benefits with the purpose of enabling the widow to remain at home and care for the children. *Id.* at 649. It was not felt that such payments were necessary to a widower since "a man generally continues to work to support himself and his children after the death or disability of his wife." *Id.* at 652-53 n. 20.

93 *Id.* at 651.

94 421 U.S. 7 (1975).

95 *Id.* at 14.

96 *Id.* at 13.

97 As in *Reed,* the Court cited *Royster Guano Co.,* 253 U.S. at 415 to support its decision. *See* note 78 *supra.*

to be applied to sex discrimination cases. The Court attempted to clarify its position in *Craig v. Boren*.[98]

In *Craig*, the Court was requested to invalidate an Oklahoma statute that prohibited the sale of "non-intoxicating" beer containing a 3.2% alcohol content to males under the age of 21 and to females under the age of 18. The state contended that the purpose of the challenged legislation was the enhancement of traffic safety. It introduced evidence showing, among other things, that both the number of arrests for drunkenness and the number of traffic accidents were greater for males than for females. The Court was not persuaded by these facts and said, "[S]tatistical evidence . . . offers only a weak answer to the equal protection question presented here."[99] It did not feel that the state's interest justified a "classification based on a three-year age differential between the sexes, and especially one that is so easily circumvented as to be virtually meaningless."[100]

The equal protection test enunciated by the *Craig* Court is a product of sex discrimination case precedent and is coincident with the *Weber* two-fold inquiry. The Court said that "[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."[101] Inherent in this analysis is a balancing process by which the Court weighs the state interest against the character of the discrimination caused by the statutory classification. If the Court concludes that the governmental interest is insufficient or is not substantially served by the classification, the statute is struck down.

The standard specified in *Craig* was not embraced by all of the Justices. Four wrote concurring opinions[102] while two[103] dissented. This lack of agreement is indicative of the difficulty that the various members of the Supreme Court have had in agreeing upon a standard of equal protection that can be applied to a wide variety of legislative classifications.[104] This divergence of opinion is not due solely to the varying backgrounds and beliefs of the individual Justices; rather, it is due in substantial part to the ambiguous nature of the fourteenth amendment itself.

IV. "Fluid" Equal Protection

The fourteenth amendment has become the most litigated and controversial of the Civil War Amendments because the search for the historical meaning of the amendment has proven frustrating and inconclusive. The late Chief Justice Earl Warren summarized the problem in *Brown v. Board of Education*:

> The most avid proponents of the post-War amendments undoubtedly intended them to remove all legal distinctions among "all persons born or

98 429 U.S. 190 (1976).
99 *Id.* at 201.
100 429 U.S. at 211 (Powell, J., concurring). The law forbade the sale of 3.2% beer to 18- to 20-year-old men without forbidding possession or preventing them from obtaining it from other sources, such as friends who were either older or female.
101 *Id.* at 197.
102 Justices Powell, Blackmun, Stevens, and Stewart.
103 Chief Justice Burger and Justice Rehnquist authored dissenting opinions.
104 429 U.S. at 210 n. 1 (Powell, J., concurring.)

> naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendment, and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.[105]

Since the amendment's passage in 1868, the Supreme Court has occupied the unenviable position of attempting to interpret the enigmatic words "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[106] The two-tier standard emerged as a judicially created tool to aid the Court in interpreting the amendment. As the above-cited cases pointedly illustrate, however, the Burger Court considers the traditional model to be too rigid. Therefore, the Court has subsequently devised what has been referred to as a "middle-tier" of equal protection analysis.[107] The Court has been hesitant to acknowledge openly its new standard, but a careful reading of the equal protection cases negates any other conclusion.

Justice Powell, in his concurring opinion in *Craig v. Boren,* exemplified the Court's reticence when he wrote:

> [O]ur decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential "rational basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification.[108]

Justice Rehnquist, in his spirited dissent in *Trimble v. Gordon,* recognized this middle ground in the Court's opinions. He wrote:

> [I]n several opinions of the Court, statements are found which suggest that although illegitimates are not members of a "suspect class," laws which treat them differently than those born in wedlock will receive a more far-reaching scrutiny under the Equal Protection Clause than will other laws regulating economic and social conditions.[109]

When the Justices speak of a "middle-tier" or a three-tiered analysis of equal protection, they are actually speaking of a single mode of inquiry: that is, a "fluid" equal protection analysis. Justice Stevens, in his concurring opinion in *Craig v. Boren,* articulated this point most succinctly when he wrote:

> I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.[110]

105 347 U.S. 483, 489 (1954).
106 U.S. CONST. amend. XIV, § 1.
107 429 U.S. at 210 n. 1. (Powell, J., concurring).
108 *Id.*
109 430 U.S. at 781 (Rehnquist, J., dissenting).
110 429 U.S. at 212 (Stevens, J., concurring).

The single standard alluded to by Justice Stevens comprises the *Weber* twofold inquiry: (1) what legitimate state interest does the classification promote? and (2) what fundamental personal rights might the classification endanger? This inquiry is applied to three categories of cases: (1) those concerning economic or social legislation, (2) those involving fundamental rights or suspect classifications, and (3) those falling in between, such as sex discrimination or discrimination against illegitimate children cases.

Although the Court always examines the discriminatory nature of the statute and the state interest offered as its justification, the rigor of the analysis employed by the Court varies with each category. If the Court is confronted with a challenge to an economic statute, for example, it inevitably finds that the statute bears *some* rational relationship to the legitimate state interest and therefore validates the legislation. Conversely, when the Court is faced with a statute that either impinges upon a fundamental right or discriminates on the basis of a suspect classification, the Court requires that the state have a compelling reason for its actions. If, as is almost always the case, the state's reason is not compelling, the Court strikes down the statute. Finally, the Court's treatment of those laws that involve neither economic classifications nor suspect distinctions depends on the statute's position on a spectrum which has rational basis and strict scrutiny at its poles. That is, the more the statutory classification approaches fundamental rights or makes suspect distinctions, the more rigorous the scrutiny employed and the stronger the state justification necessary. If the Court determines that the state interest served by the legislative classification does not justify the legislation's discriminatory character or that the discriminatory statute is only tenuously related to that objective, then the statute is invalidated. This analytical spectrum is what is meant by "fluid" equal protection. The test enunciated in *Craig v. Boren* is a point on this spectrum and serves to inform legislators of the level of scrutiny the Court will invoke in evaluating sex-based distinctions.

Justice Marshall, dissenting in *Massachusetts Bd. of Retirement v. Murgia,* recognized the Court's "fluid" approach when he wrote:

> The model's two fixed modes of analysis, strict scrutiny and mere rationality, simply do not describe the inquiry the Court has undertaken . . . in equal protection cases. Rather, the inquiry has . . . focused upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the state interest asserted in support of the classification.[111]

Thus, a close reading of the above-cited cases reveals that the Supreme Court has employed a single analytical device, the *Weber* twofold inquiry, when examining legislation challenged on equal protection grounds. The Court's analysis is best conceptualized as a spectrum that has rational basis and strict scrutiny at its poles. The level of the Court's scrutiny varies as a function of the challenged statute's position on the spectrum. The Court's approach is sufficiently malleable to apply to all equal protection cases. This characteristic is perhaps a reaction

111 427 U.S. 307, 318 (Marshall, J., dissenting).

by the Court to the perceived rigidity of the basic two-tier model. In any event, the most prominent feature of the "fluid" analysis is its flexibility. This same flexibility, however, is also the greatest weakness of the "fluid" approach because it enables the Court to have virtually unfettered discretion in regard to cases falling in between the extremes of the spectrum to determine the legitimacy of the state interest and the adequacy with which the statute serves that interest.

The problems are readily apparent. The Court, by placing itself in a legislative position, can second-guess federal and state legislative judgments in areas where it has little or no expertise. This is troublesome because, as Justice Rehnquist said in *Trimble,* "there is absolutely nothing to be implied from the fact that [the Justices] hold judicial commissions that would enable [them] to answer any one of these questions better than the legislators to whose initial decision they were committed."[112]

Cases such as *Glona, Weber, Trimble,* and *Craig* indicate that the Court has not refrained from exercising its power of review. It has not hesitated to invalidate statutes when it felt that the legislation did not promote the state interest specified or was "so easily circumvented as to be virtually meaningless."[113] As a result, legislators have faced a dilemma when enacting legislation that affected classifications in the middle of the spectrum, such as sex and illegitimacy, because they could not be certain how the Court would react. A classic example is *Trimble.* The law invalidated in that case was very similar to the one upheld in *Labine;* in fact, four Supreme Court Justices and the highest state court of Illinois found the cases to be indistinguishable. Legislators, when drafting legislation concerning these areas, could justifiably wonder what they had to do to be within constitutional limits.

This problem of uncertainty is not nearly as severe with cases falling into either one of the two established tiers. Legislators know that when they devise laws regulating economic or social conditions the law must merely have a reasonable relationship to a legitimate state interest. Conversely, when legislators pass laws impinging on fundamental rights or making suspect classifications, they know that the statutes will be invalidated unless a compelling reason is shown.[114] Thus, the Court's predictable responses alleviate confusion and provide for uniformity.

The plight of legislators in enacting statutes that fall between these extremes may have been eased somewhat by the Court's enunciation of the *Craig* standard which states that classifications by gender must serve "important governmental objectives" and must be "substantially related" to the achievement of those objectives. They were thus given an indication of where on the spectrum the statutes would fall and of the consequent level of scrutiny the Court would employ when it examined legislation challenged as sexually discriminatory.[115] Still, questions remain. Who is to decide what is an "important governmental objective"? What does "substantially related" mean? "Both of the phrases used

112 430 U.S. at 784 (Rehnquist, J., dissenting).
113 429 U.S. at 211 (Powell, J., concurring).
114 *See* note 21 *supra.*
115 It is conceivable that the *Craig* standard will be applied to illegitimate children cases. This seems likely considering the parallel treatment the two areas have received over the years.

are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at 'important' objectives, or whether the relationship to these objectives is 'substantial' enough."[116]

The subjective approach taken by the Supreme Court in cases falling between the two tiers is similar to its substantive due process approach[117] of the early 1900's. As before, the Court has been unable to devise a general equal protection standard for evaluating such legislation that adequately covers the wide variety of statutory classifications with which the Court must contend. The inquiries used in *Weber* and *Craig* lack specificity and are insufficiently objective to be applied as general standards. In addition, after examining *Kahn* and *Ballard,* it cannot be maintained that the Court has applied its reasoning consistently. Finally, the Court's expansive view of equally protected rights has caused it to deliberate over such unimportant matters as whether or not an 18-year-old male can buy beer. These similarities are both disturbing and unfortunate since the Court's previous treatment of cases under substantive due process has been disavowed by the Court itself.[118]

What is perhaps most ironic is that this is the same Court that was reluctant to add to the list of fundamental interests and suspect classifications specified by its predecessors. By using its subjective form of analysis, however, the Court has invalidated statutes that it would have sustained using a rational basis approach. Thus, the result has been practically the same as if they had labelled sex and illegitimacy to be suspect classifications and thereby examined legislation affecting these areas with strict scrutiny.

V. Conclusion

There are two reasons why it is difficult to criticize the Court's handling, under the banner of equal protection, of cases involving sex-based discrimination and discrimination against illegitimate children. First, as noted earlier, the Court has been put in the unenviable position of trying to interpret those pregnant words of the fourteenth amendment with little or no legislative guidance. Second, there seems to be no real reason to discriminate against people because of characteristics with which they were born. As the Court cogently pointed out in *Weber*:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bands of marriage. But visiting this condemnation on the head of an infant is both illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an

116 429 U.S. at 221 (Rehnquist, J., dissenting).
117 *See* text accompanying notes 5 to 14 *supra.*
118 *See* text accompanying notes 10 to 14 *supra.* Indeed, by comparing these characteristics with those of "fluid" equal protection, a marked resemblance in the two approaches can be seen. In the substantive due process era, the Court extended the meaning of "liberty" and "property." The present Court's expansive attitude toward equally protected rights parallels that earlier approach. Arguably, this is substantive due process under another heading.

ineffectual—as well as an unjust—way of deterring the parent.[119]

It is equally illogical and unjust to discriminate against a woman because of her sex.

What is disturbing, however, is not the Court's specific holdings, but rather, it is the confusion and inconsistency generated by the subjective judicial activism that characterizes the Court's approach to cases in the "middle-tier' between rational basis and strict scrutiny. Moreover, the Court's case-by-case approach to these cases has provided only a fragile solution to the difficulties confronting women and illegitimate children because of discrimination. A case in point is *Trimble*. Although the Court would not so acknowledge, it in essence overruled, by a five to four vote, the holding in *Labine*. The closeness of the decision strikingly illustrates the instability of the Court's resolution of these matters and demonstrates how the opinion of a single Justice about the validity of a statutory classification may be sufficient to overturn the judgment of an entire state legislature elected by the populace.

In order to correct these existing deficiencies, the present Court should adhere to the two-tier formula of its predecessors. It must, in short, decide whether it will treat cases involving sex-based discrimination and discrimination against illegitimate children with minimal or strict scrutiny. Both categories of individuals have been historically vilified. Moreover, both traditionally have lacked political power. Most importantly, however, both categories include people with characteristics that are immutable (and in the case of women, highly visible) which are determined solely by birth and which bear no relation to an ability to perform in or contribute to society.

Considering the similarities that the two categories bear to characteristics that the Court has declared to be associated with a suspect class,[120] the Court should alter its "middle-tier" approach and treat these areas with the most searching analysis of strict scrutiny.[121] Such a bold step may be criticized as an unwarranted display of judicial activism. Here, however, activism is necessary in view of the long history of discrimination against women and illegitimate children and the demonstrated unwillingness of state legislators to respect equally their natural rights.

By declaring these categories to be suspect, the Court will put both state and federal legislators on notice that distinctions made on the basis of either characteristic must be grounded on a compelling governmental interest. Because statutes rarely, if ever, pass strict scrutiny muster, legislators will be deterred

119 406 U.S. at 175.

120 *See* note 20 *supra*.

121 If, on the other hand, the Court determines that rational basis is the appropriate level of analysis, then it appears that a constitutional amendment will be necessary to protect the rights of people falling into these discriminated categories. An amendment similar to the Equal Rights Amendment (ERA) with a provision to cover discrimination on the basis of illegitimacy would be appropriate.

The Court may understandably wish to wait until the controversy surrounding the proposed ERA is resolved before it declares sex to be a suspect classification. But the chances that illegitimates will be able to rally enough political support to push through an amendment protecting them are indeed slender. Consequently, it is urged that the Court declare illegitimacy to be suspect at its first opportunity.

from making those distinctions.[122] As a result, the Justices will no longer have to undergo the self-imposed burden of defining terms like "important governmental objectives" and "substantially related." Their decisions will thus be more definitive, less confusing, and above all, more equitable. Consequently, women and illegitimates will finally be given what has been rightfully theirs all the time—full equal protection under the law.

John K. Vincent

122 *See* note 21 *supra.*